IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

O R D E R

Babu Lal Vs. Prem Chand

S.B.CR.MISC. PETITION NO.641/2006

DATE OF ORDER :: July 28, 2006

PRESENT

HON'BLE MR.JUSTICE H.R.PANWAR

Mr.C.R.Jakhar, for the petitioner.
Mr.Rajesh Shah, for non-petitioner.

BY THE COURT:

This criminal misc. petition under section 482 Cr.P.C. is directed against the order dt. 15.4.2006 passed by the Additional Sessions Judge no.1, Jodhpur (for short 'the revisional court' hereinafter), whereby the revision petition filed by the petitioner against the order dt. 23.7.2005 passed by the Additional Chief Judicial Magistrate, (CBI Cases), Jodhpur (for short 'the trial court' hereinafter), was dismissed

I have heard learned counsel for the parties. Carefully gone through the orders passed by the trial court as well as by

the revisional court.

It is contended by the learned counsel for the petitioner that by order dt. 27.1.2005, the trial court in absence of the complainant-non-petitioner, dismissed the complaint filed by him under section 138 of the Negotiable Instruments Act, 1881 (for short 'the Act' hereinafter) in default and, therefore, the trial court was not empowered to recall or review that order. Learned counsel for the petitioner has relied on a decision of the Hon'ble Supreme Court in Adalat Prasad vs. Rooplal Jindal & Ors., **JT 2004 (7) SC 243**.

Facts giving rise to the instant petition are that the non-petitioner-complainant filed a complaint under section 138 of the Act against the petitioner. The complaint was at the initial stage. The matter was posted to 27.01.2005, however, the counsel for the complainant-non-petitioner instead of noting the date 27.1.2005 in his Peshi Diary by mistake recorded the date as 28.1.2005 and, therefore, on 27.01.2005, neither the complainant-non-petitioner nor his counsel appeared before the trial court and the trial court dismissed the complaint in default. Learned counsel for the non-petitioner complainant submits that the complainant's counsel appeared before the trial court and produced the copy of Peshi Diary showing the date recorded in

Peshi Diary as 28.1.2005 instead of 27.1.2005. The trial court found the ground of absence of the complainant reasonable, by order dt. 27.7.2005 restored the complaint. That order came to be challenged before the revisional and revisional court relying on a decision of the Hon'ble Supreme Court in Mohammed Azeem vs. A.Venkatesh & Anr., **2003 Cr.L.R. (S.C.) 211,** dismissed the revision.

I have given my thoughtful consideration to the submissions made by the learned counsel for the parties. It is true that the Code of Criminal Procedure, 1973 (for short 'the Code' hereinafter) does not contemplate the power to review or recall the order by the criminal court except the provision of section 362 of the Code, which provides that save as otherwise provided by this Code or by any other law for the time being in force, no Court when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error. However, relying on the decision of the Hon'ble Supreme Court, the trial court restored the complaint on being satisfied by the explanation furnished by the non-petitioner for his non-appearance.

In Adalat Prasad vs. Rooplal Jindal & Ors. (supra), the Hon'ble Supreme Court held that the Code does not contemplate

the power or review or recall the order by the criminal court. However, in Mohammed Azeem vs. Venkatesh & Anr. (supra), on the similar facts, the Metropolitan Magistrate and the High Court declined to restore the complaint. The Apex Court held that the cause shown by the complainant of his absence that he had wrongly noted the date, has not been disbelieved. It should have been held to be a valid ground for restoration of the complaint. In that case, the complainant wrongly noted the date for hearing. Due to his absence on one day fixed for trial, the Magistrate dismissed his complaint and acquitted the accused. The order of Magistrate was challenged by way of an appeal under section 378(4) of the Code to the High Court. The High Court dismissed the appeal. The complainant therein carried the matter to the Hon'ble Supreme Court and the Supreme Court having noticed that there was one singular default in appearance on the part of the complainant and, therefore, cause shown by the complainant of his absence, he has wrongly noted the date, has not been disbelieve and it was held that it should have been held to be valid ground for restoration of the complaint. While setting aside the orders of Metropolitan Magistrate and the High Court, the complaint was restored.

In Associated Cement Co. Ltd. vs. Keshvanand, **AIR 1998 SC 596,** while considering the provisions of section 256,

Cr.P.C., the Hon'ble Supreme Court held that two constraints are imposed on the Court for exercising the power under the S.256. First is, if the Court thinks that in a situation it is proper to adjourn the hearing then the Magistrate shall not acquit the accused. Second is, when the Magistrate considers that personal attendance of the complainant is not necessary on that day the Magistrate has the power to dispense with his attendance and proceed with the case. When the Court notices that the complainant is absent on a particular day the Court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the Court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must, therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice.

In Adalat Prasad vs. Rooplal Jindal & Ors. (supra), the Hon'ble Apex Court held that the Criminal Procedure Code does not contemplate a review of an order; hence in the absence of

any review power or inherent power with the subordinate criminal courts, the remedy lies in invoking Section 482 of the Code. This view was reiterated by the Hon'ble Supreme Court in in Subramanim Sethuram vs. State of Maharashtra & Anr., **2004 CR.L.J. 4609**, which reads as under:-

> "Issuance of process under Section 204 is a preliminary step in the stage of trial contemplated in Chapter XX of the Code. Such an order made at a preliminary stage being an interlocutory order, same cannot be reviewed or reconsidered by the Magistrate, there being no provision under Code for review of an order by the same Court. Hence, it is impermissible for the Magistrate to reconsider his decision to issue process in the absence of any specific provision to recall such order."

Thus, the legal position as emerges from two Three Judge Bench decision of the Hon'ble Supreme Court that once the criminal court signs the judgment or a final order disposing of the case is not empowered to alter or review the same except to correct a clerical or arithmetical error.

In the instant case, recalling the order of dismissing the complaint cannot be said to be clerical or arithmetical error. However, since the matter is before this Court and this Court in exercise of powers under section 482 of the Code as has been

held in Adalat Prasad vs. Rooplal Jindal & Ors. (supra) in order to secure the ends of justice restored the complaint. Since in the instant case, the complaint has already been restored keeping in view the decision of the Hon'ble Supreme Court in Mohammed Azeem vs. A.Venkatesh & Anr.(supra) and two Three Judge Bench decision of the Hon'ble Supreme Court in Adalat Prasad vs. Rooplal Jindal & Ors.(supra) and Subramanim Sethuram vs. State of Maharashtra & Anr., (supra) in my view it would not be in the interest of justice to interfere in the order impugned even otherwise the complainant would have approached this Court under section 482 of the Code invoking inherent jurisdiction of this Court challenging the order of the trial court dismissing the complaint, this court in the circumstances of the case, would have restored the complaint and, therefore, it cannot be said that the order impugned would result in serious miscarriage of justice or abuse of process of any court.

The petition is, therefore, dismissed. Ad interim stay order dt. 29.5.2006 is vacated.

[H.R.PANWAR],J.

m.asif/-